Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes the Environmental Protection Agency to treat Indian tribes "as a State" for purposes of regulating certain water resources within their reservations. EPA has construed such authorization as requiring a tribe to prove retained inherent regulatory authority over such waters under principles developed by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and subsequent decisions. To establish inherent authority, however, the EPA asks a tribe only to "make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act." 56 Fed. Reg. 64,876, 64,879 (1991). The EPA relied upon, and the Seventh Circuit accepted, that rationale for extending treatment-as-a-State status to the Sokaogon Chippewa Community with respect to Rice Lake, a navigable water body whose bed and banks are owned by the State of Wisconsin by virtue of the equal footing doctrine. The questions presented are:

1. Can an Indian tribe possess inherent authority to regulate navigable waters within its reservation when, under the equal footing doctrine, a State holds and exercises sovereignty over such waters and the submerged lands beneath them?

2. Does EPA's policy that Indian tribes possess inherent authority to regulate navigable waters within a reservation, based on purely hypothetical concerns that state and federal regulation may not adequately curtail water pollution by nonmembers, contravene this Court's precedents concerning the second *Montana* exception, which require that a tribe demonstrate an actual threat to self-governance before it may be deemed to have inherent regulatory authority over nonmembers or resources not held by the tribe?

LIST OF PARTIES

Petitioner, plaintiff-appellant below, is the State of Wisconsin. Respondents are the Environmental Protection Agency and Christie Whitman, defendants-appellees below, and the Sokaogon Chippewa Community ("Tribe"), intervening defendant-appellee below.[1]

[1] Throughout the course of this case, the Tribe has been referred to variously as the "Band," the "Mole Lake Band," or the "Sokaogon."

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The State of Wisconsin petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Wisconsin v. E.P.A.*, 266 F.3d 741 (7th Cir. 2001) and is reproduced in the Appendix commencing at App. 1a. The opinion of the District Court is unreported and is reproduced in the Appendix commencing at App. 15a. The decision of the respondent United States Environmental Protection Agency is not reported and is reproduced commencing at App. 37a.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2001. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 28, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Water Act of 1972 ("CWA" or "Act"), as amended, 33 US.C. § 1251-1387, and the pertinent regulation EPA has adopted under the Act, are reprinted in the appendix as indicated:

1. 33 U.S.C. §§ 1313, 1370 and 1377 are reproduced at App. 74a, 84a, and 85a.

2. Water Quality Standards: Requirements for Indian Tribes to Administer a Water Quality Standards Program, 40 C.F.R. § 131.8 (1997), is reproduced at App. 89a.

INTRODUCTION

This case presents a clash between competing claims of sovereignty over the same navigable waters: a State's assertion of sovereignty arising from the equal footing doctrine and the State's ownership of the waters and their beds, and an Indian tribe's assertion of inherent tribal authority.

The case presents two important questions. The first is whether an Indian tribe may ever demonstrate inherent authority to defeat a State's equal footing sovereignty over navigable waters. Although this Court has never expressly addressed this question, it has repeatedly recognized the States' sovereignty over their navigable waters which they obtained at statehood by operation of the equal footing doctrine. There is no dispute here that the creation of the Tribe's reservation by Secretarial proclamation, nearly a century after statehood, did not impair Wisconsin's sovereignty over the waters at issue. This Court's precedents compel the conclusion that a State's sovereignty over its own navigable waters cannot be defeated by the assertion of inherent authority by a tribe over those same waters. Like EPA, the Seventh Circuit found Wisconsin's sovereignty over the waters at issue irrelevant, but under the principles recognized by this Court, it is dispositive.

The second question is whether, even assuming the first question were answered favorably to the Tribe, a tribe can make the showing required to establish inherent authority based upon a merely hypothetical threat of water pollution from nonmember activities, notwithstanding the existence of comprehensive state and federal pollution control regimes designed to prevent environmental harm. This Court has made clear that the threat from nonmembers must imperil the Tribe's ability to govern itself. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997), *quoting Montana*, 450 U.S. at 564 (unconsented tribal authority over nonmembers does not extend "beyond what is necessary to protect tribal self-government or to control internal relations.'") Otherwise, in the

absence of consent by the nonmember, the general rule applies: "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana,* 450 U.S. at 565.

EPA has pried wide open the "very narrow" exception to the general rule recognized by the Court. *County of Yakima v. Yakima Indian Nation,* 502 U.S. 251, 267 (1992). The agency has adopted a national policy under which the potential for pollution of any water used by a tribe within its reservation is sufficient to demonstrate tribal authority. This policy ignores the requirement that the tribe must demonstrate the existence of an actual threat to self-government. As a result, EPA's reformulation of the *Montana* second exception, endorsed by the Seventh Circuit, would "severely shrink" the general rule that tribes lack authority over nonmembers. *Strate*, 520 U.S. at 458.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, embodies "a partnership between the States and the Federal Government" in order to fulfill the common purpose of preventing water pollution. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). One of the functions assigned to States is the establishment of water quality standards for their waters, and the certification of compliance with such standards as a prerequisite for the issuance of discharge permits. 33 U.S.C. §§ 1313 & 1341(a); 40 C.F.R. § 122.4(b) & (d). (App. 74a-83a) Wisconsin's comprehensive water pollution regulatory system, including its water quality standards, was one of the first in the nation to receive federal approval under the CWA. *See* 60 Fed. Reg. 25,722-23 (1995).

In 1987 Congress amended the CWA to allow Indian tribes to be treated as states ("TAS")[2] for various purposes under the Act. Pub. L. 100-4, tit. V, § 506, 101 Stat. 76, *codified at* 33 U.S.C. § 1377. That amendment, section 518 of the Act (33 U.S.C. § 1377) (App. 85a-88a) provides in subsection (e), in relevant part:

> The [EPA] Administrator is authorized to treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of this section, but only if—
>
> . . . .
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

In December 1991 EPA promulgated a rule implementing section 518(e). 40 C.F.R. § 131.3-131.8 (1996) (App. 89a) (discussed and explained at 56 Fed. Reg. 64,876 *et seq.* (1991) (App. 93a). EPA's rule sets forth the prerequisites to the granting of TAS status for purposes of administering a water quality standards program, including a requirement tracking the jurisdictional provision cited above:

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[2] This petition will use the abbreviation "TAS" to denominate "treatment as a State," or EPA's later refinement of that phrase, "treatment in the same manner as a State." (*See* Final Rule, *Indian Tribes; Eligibility for Program Authorization*, 59 Fed. Reg. 64,339 (Dec. 14, 1994)).

> (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation.

40 C.F.R. § 131.8(a)(3) (2001) (App. 89a).

In interpreting the statute and promulgating its rule, EPA rejected the argument that in enacting section 518 Congress had expressly delegated federal power under the Clean Water Act to tribes. Instead, after thoroughly reviewing the legislative history of section 518, EPA determined that "Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law." (56 Fed. Reg. 64,880 (1991), App. 105a). This echoed its earlier conclusion that the CWA "authorizes use of *existing* Tribal regulatory authority for managing EPA programs, but it does not grant additional authority to Tribes." 54 Fed. Reg. 39,101 (1989) (emphasis added). This approach was also consistent with Congress' expressed intention in the CWA to minimize any intrusion into states' regulatory power: "Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. (App. 84a)

Accordingly, EPA concluded that "it will . . . continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana*, *Brendale*, and other applicable case law." (App.105a) EPA effectuated its interpretation by promulgating a requirement that the Tribe submit "[a] statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes (sic) assertion of authority." 40 C.F.R. § 131.8(b)(3)(ii) (2001). (App. 90a)

Montana set forth the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. However, the Court recognized two exceptions; the relevant one here being "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. EPA concluded that tribal authority for TAS purposes is to be evaluated in light of this so-called *Montana* "second exception." 56 Fed. Reg. 64,877-78 (1991) (App. 94a-95a).

Having identified the controlling case law, however, EPA professed its uncertainty as to the precise standard applicable to claims of inherent tribal authority over nonmembers. This led EPA to announce that "[i]n response to this uncertainty, the Agency will apply as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed. Reg. 64,878 (1991) (App. 97a). EPA also announced that the question "[w]hether a tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual findings." 56 Fed. Reg. 64,878 (1991) (App. 97a).

Notwithstanding the agency's statements that a tribe must provide specific facts demonstrating serious and

substantial threats, EPA proceeded to conclude that to demonstrate the requisite authority a tribe need only "make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members." 56 Fed. Reg. 64,879 (1991) (App. 100a). This lenient test derives from EPA's generalized finding that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually be able to meet the Agency's operating rule . . . ." 56 Fed. Reg. 64,878 (1991) (App. 97a). Indeed, under EPA's test any tribe with waters within its reservation is virtually assured of obtaining TAS status.[3]

II. PROCEEDINGS BELOW.

A. Administrative Proceedings.

In August 1994, the Tribe applied to EPA for treatment as a state for the purpose of establishing water quality standards for reservation waters, pursuant to section 303 of the CWA (33 U.S.C. § 1313) (App. 74a-83a). Wisconsin, pursuant to 40 C.F.R. § 131.8(c)(3), objected to the Tribe's application on the ground that the equal footing doctrine operated to reserve all navigable waters and the lands under

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[3] This is confirmed by EPA's admission that "[a]s a general policy, EPA will not deny a tribal application" (EPA Water Quality Standards Handbook: Second Edition at 14). (CR:121, Attachment B) Instead, in the unlikely event that EPA ever receives a tribal application which did not appear to meet this standard, EPA has declared that "[r]ather than formally deny [a] Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the Tribal program so that Tribal recognition as a State may occur." 56 Fed. Reg. 64,885 (1991) (App. 107a).

them for the people of Wisconsin, and that the creation of the Tribe's reservation in 1939, 91 years after statehood, did not abrogate the state's sovereignty over the navigable waters on and adjacent to the reservation. (App. 59a-61a, 62a-73a)

In light of Wisconsin's objection to the TAS application, EPA's Regional Counsel referred the matter to the EPA headquarters Office of General Counsel (OGC) for resolution. (App. 115a) The OGC found irrelevant Wisconsin's claim to sovereignty over the waters at issue under the equal footing doctrine: "EPA need not answer the complicated and fact-specific question of whether the State retains title to the beds of navigable waters within the Mole Lake Reservation." (App. 44a). Instead, the OGC relied upon EPA's "generalized findings" of potential adverse impacts to support its conclusion here that "any activities of non-members in the navigable waters . . . could be expected to have a serious and substantial effect on the health and welfare of the Band." (App. 47a). EPA made this finding notwithstanding its acknowledgment that the absence of nonmember-owned lands within the Band's reservation made the likelihood that any on-reservation nonmember activity would impair reservation waters "remote." (App. 45a)

EPA formally approved the Tribe's application in a letter dated September 29, 1995. (App. 37a-47a)

B. Judicial Review of the EPA's Decision.

Wisconsin brought this action in January 1996, pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, seeking review of EPA's decision. Wisconsin subsequently stipulated to intervention by the Tribe. (CR:1, 6)

In April 1999, the district court issued a decision and order granting EPA's and the Tribe's motions for summary

judgment. (App. 15a-34a) The district court analyzed neither the state's claim of sovereignty under the equal footing doctrine nor EPA's interpretation and application of Indian law precedent. Instead, it summarily deferred to EPA's decision as "reasonable and permissible." (App. 32a)

Wisconsin appealed, and the Seventh Circuit affirmed. (App. 1a-14a) The decision recognized EPA's conclusion that section 518(e) was not "a plenary delegation of inherent authority to tribes to regulate all reservation waters," 266 F.3d at 744 (App. 3a-4a). Nonetheless, the court turned aside Wisconsin's claim of competing sovereignty under the equal footing doctrine because the statute "explicitly gives authority over waters within the borders of the reservation to the tribe and does not even discuss ownership rights." 266 F.3d at 747 (App. 8a). Further, the court observed, the federal government could, pursuant to its commerce clause powers, regulate Wisconsin's navigable waters notwithstanding Wisconsin's ownership of the beds of those waters. Apparently equating tribal power with federal commerce clause power, the Seventh Circuit reasoned that because state sovereignty over those waters did not displace federal authority, it does not preclude tribal authority either.[4] 266 F.3d at 747 (App. 9a-10a).

Addressing the issue of the Tribe's claim of inherent authority under the *Montana* second exception, the court found the test satisfied based on EPA's determination that

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[4] The opinion below asserted that the approval of TAS authority "alarmed" Wisconsin because of its " potential to throw a wrench into the state's planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake." 266 F.3d at 745. With due respect, there is nothing in the administrative record that supports this statement. There is a permit application for a proposed mine upstream from Rice Lake (although not on the Wolf River, which is downstream) currently pending before the Wisconsin Department of Natural Resources. However, a private company—not the State—would own and operate the mine; the State, concurrently with EPA, has environmental regulatory authority over such projects.

"'water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government.'" 266 F.3d at 748, *quoting* 56 Fed. Reg. at 64879. (App. 10a-11a) The court accorded deference to EPA's decision under this Court's decisions in *U.S. v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001), and *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 843 (1984). 266 F.3d at 746 (App. 6a-7a).

Wisconsin sought rehearing and suggested rehearing *en banc*, which the Seventh Circuit denied by order dated November 28, 2001. (App.48a-49a)

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS OF COMPETING SOVEREIGNTY PRESENTED HERE ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

This Court has long recognized the sovereign nature of the States' interest in their navigable waters, acquired at statehood. "The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283–284 (1997). "State ownership of [submerged lands] has been 'considered an essential attribute of sovereignty.'" *Ibid.* at 283, quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). As Justice Holmes observed, few matters "are more obvious, indisputable, and independent of particular theory" than the sovereign authority of a State to regulate the uses and development of navigable waters within its borders, subject to the constraints in the federal Constitution and to appropriate congressional regulation under the Commerce

Clause. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). If the decision below is allowed to stand, Wisconsin will lose much of that authority with respect to hundreds of navigable water bodies.

This Court previously has been called upon to resolve competing claims of title by states and tribes to the beds of navigable lakes within an Indian reservation, *Idaho v. United States*, 533 U.S. 262 (2001); *United States v. Holt State Bank*, 270 U.S. 49, 59 (1926); and competing claims of title to the bed of a river within a reservation, *Montana*, 450 U.S. at 556. Although, as Wisconsin shows below, it is implicit in *Montana* that tribal inherent authority cannot displace state sovereignty over navigable waters, the Court has never directly confronted the claim accepted by the court below—namely that tribal inherent authority *can* override state sovereignty with respect to the state's waters. This case starkly presents the collision of these competing claims of sovereignty.

Wisconsin exemplifies the potential impact of the ruling below. Each of Wisconsin's eleven Indian tribes has a reservation. Some consist of large contiguous parcels, while others consist of small, widely scattered land holdings. All eleven tribes, however, hold lands adjacent to or surrounding navigable waters. By EPA's estimate, on Wisconsin's Indian reservations there are many hundreds of navigable lakes.[5] Under the decision below, any Wisconsin tribe which applies for TAS authority to regulate those waters is assured of receiving EPA approval under its lenient test. Because there are Indian lands on several major rivers within Wisconsin, a

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[5] *See* http://www.epa.gov/reg5oopa/tribes/wisconsintribes.htm. The Menominee Reservation alone contains 200 lakes. *See* http://www.epa.gov/reg5oopa/tribes/tribepages/menominee.htm. Lakes and rivers account for more than 20 percent of the Lac du Flambeau Reservation's surface area and 40 percent of the reservation's population are nonmembers of the tribe. *See* http://www.epa.gov/reg5oopa/tribes/tribepages/lacduflambeau.htm.

grant of TAS status to the Tribe could require upstream wastewater dischargers—including many municipalities and industrial dischargers—to meet tribal water quality standards, pursuant to 33 U.S.C. § 1341.

Exacerbating the mischief caused by EPA's policy is the deference the Seventh Circuit accorded to EPA's interpretation of Indian law precedent. 266 F.3d at 746. As one appellate court has put it, "[i]t is nonsense to suggest that a federal court must defer to an administrative agency in determining the meaning and applicability of the court's own precedent." *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992). When faced with this precise issue, the Ninth Circuit declined to defer to EPA's legal analysis of Indian law precedent. *See State of Mont. v. U.S. E.P.A.*, 137 F.3d 1135, 1140 (9th Cir.), *cert den.*, 525 U.S. 921 (1998) ("EPA's delineation of the scope of tribal inherent authority is not entitled to deference"). In deferring to EPA's interpretation and application of Indian law precedent, matters well beyond its institutional expertise, the court below misapplied *Chevron*.

The issues presented here are not unique to Wisconsin, but are of national significance. In EPA's initial response to Wisconsin's competing claim of jurisdiction it wrote: "EPA considers some issues raised by WDNR [Wisconsin Department of Natural Resources] (i.e., ownership of water beds within the reservation and the effect of that ownership on the right to regulate water quality) to be nationally significant." (App. 115a) EPA reports that over 210 tribes nationwide have received TAS status under various provisions of the Clean Water and Safe Drinking Water Acts, 42 U.S.C. § 300j-11; as of March 1998, 14 tribes had obtained EPA's TAS approvals under section 303 of the CWA for their water quality standards program. [6] EPA has announced its intentions

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[6] *See* http://www.epa.gov/indian/matrix.htm;

http://www.epa.gov/ow/strategy/, pages 9 and 11

to increase that number by five-fold by 2005.[7] Given that the legal issues presented here arise from the national policies EPA is actively promoting, these problems likely will recur until resolved by this Court. *See State of Mont.*, 137 F.3d at 1141 (deferring to EPA's application of the *Montana* second exception and upholding grant of TAS to tribe).

This dispute is far more than an academic exercise. The Court has cautioned against "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 495 U.S. 676, 694 (1990). This caution is based on an "overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty,'" *Nevada v. Hicks*, 121 S. Ct. 2304, 2323 (2001), *quoting Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). The Court has also recognized that the "ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals.'" *Hicks*, 121 S. Ct. at 2323, quoting *Duro*, 495 U.S. at 693 (Souter, concurring). Unless EPA's policy is corrected, large numbers of nonmembers in this country may find, to their considerable surprise, that they have become subject, either directly or indirectly, to the authority of tribal governments in which they have no rights to participate and which may provide limited opportunity for fair review of adverse tribal decisions. This is particularly true on

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[7] *See ibid.*, page 11. *See also ibid.*, at 18 (EPA Indian Program "key" objectives include "[i]ncreas[ing] significantly the number of Tribes implementing environmental programs.")

reservations, like some in Wisconsin, populated by large numbers of nonmembers.[8]

This case is a good vehicle for addressing the limits of tribal sovereignty over nontribal resources and persons. It squarely presents the clash between a state's sovereignty over its own public waters, under the equal footing doctrine, and tribal assertions of inherent authority to regulate those same waters. It also provides a good context for clarifying the scope of tribal inherent authority under the so-called "second exception" of *Montana*. The relevant facts are straightforward and undisputed, providing a clear avenue to address both of the fundamentally important issues this case presents.

II. EPA'S POLICY, ENDORSED BY THE SEVENTH CIRCUIT, CONFLICTS WITH THIS COURT'S PRECEDENTS BY ALLOWING TRIBAL CLAIMS OF INHERENT AUTHORITY TO OVERRIDE STATE SOVEREIGNTY OVER NAVIGABLE WATERS UNDER THE EQUAL FOOTING DOCTRINE.

By allowing the Tribe to exercise regulatory authority over Wisconsin's waters, the Seventh Circuit's decision has undercut this Court's precedents recognizing the State's sovereignty over its waters. Both the court below and EPA

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[8] For example, nonmembers of the Oneida Nation own approximately 80 percent of the 65,000-acre Oneida reservation, which is located partially within the City of Green Bay, and comprise approximately 85 percent of the reservation population.

See http://www.epa.gov/reg5oopa/tribes/tribepages/oneida.htm and http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=25000US2560.html

assumed Wisconsin had obtained title to the waters and their beds under the equal footing doctrine, but found this entirely compatible with the Tribe's assertion of inherent authority over those same waters. 266 F.3d at 746, citing, *inter alia*, *Idaho*, 521 U.S. at 283-88. (App. 7a-8a) The Seventh Circuit thus found "reasonable" EPA's conclusion that "ownership of the waterbeds did not preclude federally approved regulation of the quality of the water" by the Tribe. *Wisconsin*, 266 F.3d at 747. (App. 10a)

This miserly view of States' interests under the equal footing doctrine cannot be reconciled with this Court's precedents. This Court long ago rejected the notion that a State and an Indian tribe can possess "dual sovereignty" over natural resources within a State: "[s]uch a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both." *Kennedy v. Becker*, 241 U.S. 556, 563 (1916). *Kennedy* relied on the obvious distinction, equally relevant here, between tribal rights to use natural resources and tribal sovereignty to regulate them. *See also Puyallup Tribe v. Department of Game, Wash.*, 391 U.S. 392, 399 (1968) (tribal fishing rights subject to "overriding police power of the State" to conserve fish and game resources); *United States v. Winans*, 198 U.S. 371, 384 (1905); *United States v. State of Washington*, 520 F.2d 676, 686, n. 4 (9th Cir. 1975).

Wisconsin recognizes and respects the Tribe's use rights in Wisconsin's natural resources, and its ability to protect those rights, but those rights do not give rise to tribal power to regulate the resources. *See Lac Courte Oreilles Band of Indians v. State*, 707 F. Supp. 1034, 1053 (W.D. Wis. 1989) (crediting Wisconsin with accommodating tribal use rights). In fact, this Tribe litigated and lost on the dual sovereignty issue in previous litigation with the State of Wisconsin concerning the prerogative to manage fisheries. *Ibid.* at 1060 ("The fact that [the tribes] may be regulating their members' exercise of their treaty rights does not make them the manager of the fisheries. That responsibility and authority remains the [State's].)"

With respect to the waters at issue here, as between the State and the Tribe sovereignty resides exclusively with the State. When Wisconsin attained statehood in 1848 it obtained title to the waters at issue and their beds, through operation of the equal footing doctrine.[9] *Coeur d'Alene*, 521 U.S. at 283. Along with that title flowed the sovereign right to control their use.

In *Idaho*, 521 U.S. 261, for example, a tribe sued a state to establish tribal ownership of navigable waters lying within the Tribe's reservation. The Court emphasized that far more was at stake than mere title to submerged lands. There the

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[9] The state's enabling act, Act of August 6, 1846, 9 Stat. 56, authorized admission "into the Union on an equal footing with the original States in all respects whatsoever," and, consistent with the Northwest Ordinance of 1787, provided that all waters within the new state would be "forever free, as well to the inhabitants of the said State as to the citizens of the United States." *Ibid.* § 3, 9 Stat. 57. The "forever free" guarantee was then carried over into Art. IX, § 1 of the Wisconsin Constitution. As a state that was part of the Northwest Territory, Wisconsin's ownership and sovereignty over its navigable waters and the beds of those waters are governed by the public trust doctrine. *See Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-53 (1892).

Court noted that if the Tribe could establish ownership of the waters,

> substantially all benefits of ownership and control would shift from the State to the Tribe.
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> . . .
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> Not only would the relief block all attempts by these [state] officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect. As we stressed in *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-98, 107 S. Ct. 2318, 2320-2322, 96 L.Ed.2d 162 (1987), lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty." . . .
>
> The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests. The principle arises from ancient doctrines.

521 U.S. at 282-84. That the beds of navigable waters "are tied in a unique way to sovereignty," *Ibid.*, 521 U.S. at 286, is reinforced in other decisions of this Court. *See United States v. State of Oregon*, 295 U.S. 1, 14 (1935); *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22 (1935); *Withers v. Buckley, et al.*, 61 U.S. (20 How.) 84, 92-93 (1858); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224 (1844).

In *Montana* itself this Court emphasized the sovereignty accompanying state ownership of the beds of navigable waters. In fact, the United States brought that action seeking a declaration that the Tribe—not the state—owned the bed of the Big Horn River, under the theory that this would establish a sufficient basis for tribal regulatory authority over nonmember hunting and fishing. 450 U.S. at 549. In Part II of its decision, this Court noted that all of the parties and the courts below "assumed that ownership of the riverbed will largely determine the power to control [nonmember hunting and fishing in and on the river]." 450 U.S. at 550 n.1. Far from expressing any disagreement with that proposition, this Court elaborated that "the ownership of land under navigable waters is an incident of sovereignty." 450 U.S. at 551.

Having disposed of the tribal claim of regulatory authority over the *waters* of the Big Horn River, by virtue of its equal footing analysis, the Court then turned, in part III of its decision, to the tribe's assertion of regulatory authority over nonmembers on reservation *lands*. The issue here was "the power of the Tribe to regulate non-Indian fishing and hunting *on reservation land owned in fee by nonmembers* of the Tribe." *Id.* (emphasis added). It was only in this context—regulation of nonmember activities on fee lands, as opposed to activities in the waters themselves—that the Court announced its "general rule" against tribal authority. 450 U.S. at 566. Thus, ownership of the beds of navigable waters is not irrelevant, as the Seventh Circuit concluded, but is *dispositive* of the issue of tribal authority over those waters.

That Wisconsin has held the waters at issue here since statehood is not disputed. The Tribe has never had the right to "occupy and exclude" nonmembers from Rice Lake or any other public waters in the State of Wisconsin. The Tribe's reservation was not created until 91 years after Wisconsin was admitted into the Union—in 1939—when the United

States placed into trust 1,438 acres of land that it had purchased adjacent to those waters.[10] (App. 109a) No party to this suit has contended that in 1939 the United States, by administratively proclaiming a reservation consisting of the dry lands adjacent to navigable waters, purported to impair Wisconsin's longstanding ownership of and sovereignty over those waters.[11] As this Court has observed in this context, "of course" the government was aware of the presumption against federal conveyance of navigable waters to the detriment of state sovereignty "once it was established by this Court." *Montana*, 450 U.S. at 552 n.2, *citing inter alia,* the *United States v. Holt State Bank*, 270 U.S. 49 (1926), which was decided thirteen years before the Band's reservation was created. It was similarly then understood that "[I]f navigable waters have not been reserved the tribe has but a right of use in common with citizens of the state." Felix S. Cohen, *Handbook of Federal Indian Law*, 318 (1941).

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[10] By 1842, six years before Wisconsin became a state, the Chippewa, including the Band, had ceded to the United States all their Wisconsin lands, retaining only use and occupancy rights. *See Sokaogon Chippewa Community v. Exxon Corp.*, 805 F. Supp. 680, 686 (E.D. Wis. 1992), *aff'd* 2 F.3d 219 (7th Cir. 1993). Thus in 1848 the Tribe had no territory over which it exercised sovereignty; the site of its future reservation, including the waters at issue here, passed to Wisconsin and became subject to its sovereign power. The reservation was created by proclamation of the Assistant Secretary of the Interior pursuant to § 7 of the Indian Reorganization Act of 1934, 48 Stat. 986, 25 U.S.C. § 467. 4 Fed. Reg. 1429 (1939) (App. 108a-109a).

[11] To be sure, there are circumstances in which the presumption of state title to and sovereignty over navigable water may be overcome and where equal footing considerations therefore would not pose an obstacle to tribal TAS authority. *See, e.g., Idaho v. United States*, 533 U.S. 262 (2001); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Muckleshoot Indian Tribe v. Trans-Canada*, 713 F.2d 455, 457 (9th Cir. 1983); and *Confederated Salish & Kootenai Tribes, Etc. v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982).

The decision below suggests that Wisconsin's sovereignty under the equal footing doctrine has been somehow overridden by Congress' enactment of section 518(e). According to the Seventh Circuit, Wisconsin's equal footing claim is irrelevant because "[t]he Clean Water Act . . . explicitly gives authority over waters within the borders of the reservation to the tribe and does not even discuss ownership rights." 266 F.3d at 747 (App. 8a). This is contrary to EPA's conclusion that section 518(e) did not delegate federal authority to tribes, but merely recognized existing tribal authority. As *Montana* teaches, when a state owns water beds and possesses sovereignty over them under the equal footing doctrine, that is the end of the inquiry with respect to regulatory authority over those waters.

This Court has found the second exception applicable in a variety of contexts. Examples include situations where reservation lands are owned in fee by nonmembers, (*Montana; Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); and *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408, 414 (1989)); where reservation lands have been taken by the federal government for public use (*South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)); and where reservation lands have been subjected to a "right-of-way open to the public" (*Strate).* However, this Court has never applied the *Montana* second exception to find tribal authority over navigable waters held by a state. When called upon to examine such a claim, this Court in *Montana* applied an equal footing analysis, not the second exception test for tribal sovereignty over alienated lands.

Wisconsin fully recognizes that the United States has regulatory authority over navigable waters under the commerce clause. *Montana*, 450 U.S. at 551; *Solid Waste Agency v. Army Corps. of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 677-78, 680-81 n.3 (2001). Contrary to the decision below, however, it simply does not follow that because the federal government has regulatory authority Wisconsin "cannot now complain

about the federal government allowing tribes to do so." *Wisconsin*, 266 F.3d at 747.

The existence of federal regulatory authority is irrelevant given EPA's determination that in enacting the TAS provision Congress did not intend to delegate any federal power to tribes, but only to recognize pre-existing tribal authority. *Wisconsin*, 266 F.3d at 748. Regardless whether the federal government can regulate the waters at issue here, under EPA's rules the Tribe must demonstrate an independent source of pre-existing tribal regulatory authority. Similarly, given Congress' intent not to alter the existing balance between tribal and state regulatory powers over waters, whether the Indian commerce clause might authorize Congress to enlarge tribal power at the expense of state sovereignty is not at issue here. 266 F.3d at 747.

In sum, Wisconsin's sovereignty over its navigable waters and their beds is incompatible with tribal inherent authority over those same waters. This Court has never held that tribal inherent authority can somehow override state sovereignty under the equal footing doctrine. Even if it could, the prerequisites for a finding of inherent authority under the *Montana* second exception are absent here, as shown next.

III. EPA'S POLICY VASTLY BROADENS THE *MONTANA* SECOND EXCEPTION, EFFECTIVELY ELIMINATING THIS COURT'S REQUIREMENT THAT TRIBES DEMONSTRATE A THREAT TO TRIBAL SELF-GOVERNANCE.

This Court has made abundantly clear the general rule that tribes lack authority over nonmembers. *Montana*, 450 U.S. at 564; *Atkinson Trading Co.*, 532 U.S. 645; and *Hicks*, 121 S.

Ct. at 2309-2310. Equally clear is that the exception at issue here is exceedingly narrow. The scope of tribal authority under the *Montana* second exception does not extend "beyond what is necessary to protect tribal self-government or to control internal relations.'" *Strate*, 520 U.S. at 459, *quoting Montana*, 450 U.S. at 564.

Applying this test, this Court has rejected attempts by tribes to adjudicate litigation involving on-reservation traffic accidents (*Strate*), to tax transactions between nonmembers on nontribal reservation lands (*Atkinson*), to adjudicate claims of misconduct by state officers on tribal land (*Hicks*), to regulate hunting and fishing by nonmembers within reservations (*Montana* and *Bourland*), and with "one minor exception,"[12] *Hicks*, 121 S. Ct. at 2310, to exercise zoning authority over nonmembers on fee lands (*Brendale*).

Further, as the Court recently observed, "[b]oth *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude' . . . the *absence* of tribal ownership has been virtually conclusive of the *absence* of tribal civil jurisdiction," *Hicks*, 121 S. Ct. at 2310 (emphasis added, citations omitted). The Seventh Circuit's decision finding the state's ownership of the waters irrelevant violates this principle.

Despite the repeated pronouncements of this Court, EPA adopted and persists in applying as its national policy an interpretation of *Montana* which guarantees a finding of tribal regulatory jurisdiction in every instance and without proof that such jurisdiction is necessary for tribal self-government. The

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[12] The "minor exception" was the holding in *Brendale* that the tribe could zone the nontribally owned property comprising approximately 3 percent of an 807,000-acre area within a reservation that was "closed to public entry." *Hicks*, 121 S. Ct. at 2310, citing *Brendale*, 492 U.S. at 443, 444, 458-459 (opinions of STEVENS, J., and BLACKMUN, J.)

court below implicitly endorsed EPA's assertion that "'water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government.'" *Wisconsin*, 266 F.3d at 748, quoting 56 Fed. Reg. at 64,879 (App. 10a-11a).

The decision below conflicts with this Court's precedents in major respects. First, *Strate* made clear that protecting health and safety alone is not essential to self-governance. The Court observed there that even though careless driving within a reservation "surely jeopardize[s] the safety of tribal members . . . if *Montana's* second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 458. The same principle applies with equal force here. Nothing in the administrative record suggests that the tribe's self-governance is in jeopardy unless it is allowed to exercise regulatory authority under the CWA over the waters adjacent to or within its reservation.[13]

Second, the disputed activity must pose a real—not abstract or hypothetical—threat to a tribe. In *Montana*, for example, the Supreme Court looked at the protective effect of existing state regulations and observed that the tribe had not alleged "that the State has abdicated or abused its responsibility for protecting and managing wildlife . . . or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State." 450 U.S. at 566 n.16. *See also Brendale*, 492 U.S. at 430-31 (Plurality Op. of J. White) (potential harm should be measured in light of regulatory

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[13] Wisconsin does not quarrel with the importance of protecting water quality, but there simply are no facts in the record to support a finding that *tribal* regulation of water quality—as opposed to federal or state regulation—is necessary for tribal self-governance. The Seventh Circuit's statement that Wisconsin conceded tribal regulation was necessary to protect the political integrity, the economic security, or the health and welfare of the tribe, *Wisconsin*, 266 F.3d at 747 (App. 8a), is erroneous; Wisconsin argued exactly the opposite. *See* Brief of Plaintiff-Appellant at 41-45.

action by non-tribal governments). Similarly, in *Strate* the Court considered the effect of allowing litigation to proceed "in the state forum open to all who sustain injuries on North Dakota's highway." 520 U.S. at 459. *See also Hicks*, 121 S. Ct. at 2316 ("That the actions of these state officers cannot threaten or affect those interests is guaranteed by the limitations of federal constitutional and statutory law to which the officers are fully subject.")

Clearly, the impacts upon tribal welfare under *Montana's* second exception are not to be considered in some sort of hypothetical regulatory vacuum. EPA has formally approved Wisconsin's water quality standards as adequate to protect public health and welfare and to enhance the environment. *See* 55 Fed. Reg. 31,892. Further, as the Seventh Circuit acknowledged, an additional regulatory safeguard exists in that EPA "has the ultimate authority to decide whether or not to issue a permit." *Wisconsin*, 266 F.3d at 750 (App. 13a). Not only does the Tribe have ample rights to challenge any permits issued by the state—through administrative as well as judicial means—but its interests are effectively protected in any event by EPA, which has veto power over state-issued permits.

The Seventh Circuit's conclusion that the Tribe's self-governance is threatened by continued state and federal–as opposed to tribal–environmental oversight is inconsistent with this Court's precedents. It clearly erred in upholding EPA's reformulation of the *Montana* second exception. 266 F.3d at 750 (App.13a). Allowing this dramatic expansion of the narrowly drawn second exception to stand would result in the widespread and unlawful assertion of tribal regulatory jurisdiction over the sovereign waters of Wisconsin and other states, and over their nonmember citizens.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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